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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-316

THOMAS GEORGE AZZONE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

The petitioner, Thomas George Azzone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit Court of Appeals entered in this proceeding on August 1, 1972.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, which is not yet reported, appears in the appendix hereto.

JURISDICTION

The judgment and opinion of the Eighth Circuit Court of Appeals were entered on August 1, 1972, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Whether a warrantless arrest and search for and seizure of stolen property is justified solely because an automobile arrives at a place and time as predicted by an informer alleged only to have been reliable in the past, and where there is no independent basis for an arrest, the search is not incidental to the arrest, and there is no consent to the search?

CONSTITUTIONAL PROVISION

Amendment [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A St. Paul, Minnesota, post-office was robbed on June 17, 1971. On June 30, a suburban Minneapolis police officer told a federal postal inspector that he had heard from

a previously reliable informer that Thomas Azzone had stolen postage for sale. Later that day, the postal inspector was told that Azzone would be selling the postage at the junction of highways 36 and 61 about 4:00 p.m. in a black Cadillac, license no. 4DV727. Stationed at that location, federal agents saw the black Cadillac arrive; after a time the driver, whom they did not recognize (it was Petitioner Azzone), left the car. The agents stopped him and asked if they could search the car; Azzone said "help yourself," and they searched the interior, finding nothing. Asked for the trunk keys, Azzone pointed to the ignition; none of these keys opened the trunk, however, and Azzone dropped a key into the interior of a car-door, whereupon he was formally arrested. The key, when retrieved, opened the trunk, where the stolen postage was found after Azzone had been taken to the police station. (After his formal arrest, Azzone tore and attempted to swallow an inventory of the postage.) The Cadillac was registered to Azzone. Azzone's conviction for receiving and concealing the stolen postage was affirmed by the Eighth Circuit Court, which found the arrest and subsequent search and seizure justified by probable cause under **White v. United States,** 448 F.2d 250 (8th Cir. 1971) as construed in light of **Adams v. Williams,** ... U.S. ..., 32 L.Ed.2d 612, 92 S. St. ... (decided June 12, 1972), which, the Court said, "effectively places its imprimatur" upon **White v. United States,** *supra.*

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Eighth Circuit Has Erroneously Confused, Combined and Extended the Holdings of This Court in Draper v. United States, 358 U.S. 307 (1959); Terry v. Ohio, 392 U.S. 1 (1968); Chambers v. Mahroney, 399 U.S. 42 (1970), and Adams v. Williams, ... U.S. ... (Decided June 12, 1972), to a Point Which Violates the Fourth Amendment by Allowing a So-Called Investigative Stop Without Probable Cause to Justify a Full-Scale Search, the Fruits of Which Are in Turn Used to Justify an Arrest, Which Then Is Seen in Effect Retroactively to Justify the Search as Incidental.

This Court has defined a number of exceptions to the Constitutional requirements of search warrants and of probable cause for a warrantless arrest. Each of these exceptions arose in a particular factual context which rendered it reasonable or inevitable in those circumstances; now those exceptions, however, are being expanded into general rules which effectively interact to emasculate the Fourth Amendment's protections and allow arrests, searches and seizures upon mere suspicion. It is essential that this Court clarify the precise and limited application of the exceptions in question for the guidance of law enforcement agencies, courts and counsel.

In affirming Petitioner's conviction, the Eighth Circuit stated but barely discussed the facts, relying almost entirely upon their earlier opinion in **White v. United States**, 448 F.2d 250 (8th Cir. 1971), as controlling authority. In **White**, the police, upon an informant's tip that White possessed counterfeit money in a certain car and was using a false name, Homer Bennett, found a man slumped over the wheel of the described car. Investigating, the police were shown by White a driver's license obviously altered to contain the name Homer Bennett;

they arrested him upon the altered license charge and an incidental search yielded the counterfeit money. The Court held that (1) the initial "stop" was valid under **Terry v. Ohio** to investigate the tip and the possibility of a drunken or ill driver, and (2) the search was valid upon probable cause under **Chambers v. Mahroney.** Note that the "investigative stop" did two things: it confirmed the informer's tip and it disclosed an offense justifying arrest. Significantly, the Court said:

> Although there was probable cause to search the car, there was not yet probable cause to arrest him on the counterfeiting charge. 448 F.2d at 254.

It is clear from this that the Court recognizes two standards of probable cause, one for a search, another for an arrest; it is also clear that the standard for a search is the lower of the two; it is **not** clear what the difference between them is, nor is the Constitutional basis for such a distinction apparent. The reasoning is circular: the tip justified the investigation; the investigation justified the license offense arrest **and the search for counterfeit money,** but it did not justify the counterfeiting arrest, to which, by implication, the search was then retroactively incidental.

In the present case, the agent's observations confirmed the informer's tip only to the extent that the Cadillac arrived at a certain place at a certain time. Mr. Azzone was not recognized and he committed no offense in the officer's presence; he was arrested for possession of the stolen postage when he dropped a key into the door panel,[1] **before** the stolen postage was discovered—there

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[1] This, of course, was not a criminal act, but the exercise of his right not to consent to a search of the car. The government conceded there was no consent to the search of the trunk. The Eighth Circuit Court's suggestion that there was consent is misleading in this regard. (p. 5) Nor was it contended that the search was incidental to the arrest, Petitioner having already been removed from the scene.

was no independent basis for the arrest. Thus, the affirmance of his conviction extends the doctrine of **Terry v. Ohio** to a point where sufficient information to justify an investigative stop blossoms into probable cause to search even though the informer's tip is not as specific and detailed as or corroborated to the extent required by **Draper v. United States.**[2] The search, moreover, is not for the officer's protection, is not incidental to the arrest; it is specifically directed to discovering the contraband sought. The lack of a warrant is excused under **Chambers v. Mahroney**, although all the exigencies as well as the probable cause information of that case are absent.

Secondly, the Eighth Circuit Court reasoned that the opinion in **Adams v. Williams**, ... U.S. ... (decided June 12, 1972), "places its imprimatur" on the **White** decision. This reasoning involves the critical misconception of which Petitioner is now the victim. In **Adams** as in **White** a **Terry** investigative stop disclosed a crime, i.e., possession of a firearm; an arrest was therefore justified; a search incidental **to that arrest** yielded other contraband. In the present case there was no independent basis for Petitioner's arrest; the only foundation upon which his arrest and the search rested were the facts that he appeared at a certain place at a certain time in a car of the type predicted by an informer. Neither **Draper**, nor **Terry**, nor **Chambers** nor **Adams** has gone nearly so far as to justify a felony arrest on such mere suspicion. The Eighth Circuit's opinion (together with the **White** decision) exemplifies a manifest misconstruction and misapplication of this Court's exceptions to the Fourth Amendment's requirements. If allowed to stand, this decision will sanction arrests, searches and seizures, in this Cir-

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[2] Note that the only support of this informer's trustworthiness was his alleged **previous** reliability, which this Court discounted in **United States v. Harris**, 403 U.S. 573 (1971).

cuit at least, whenever an informer who is alleged to have been previously reliable correctly predicts the presence of a certain person in a certain car at a certain place and time.

It is crucial that this Court more firmly define the criteria for application of the "stop and frisk," "investigative stop," and vehicular exigency exceptions to the Constitutional probable cause and warrant requirements, lest those exceptions utterly pre-empt the general rules. It is significant that the Eighth Circuit Court did not even cite or attempt to distinguish **Coolidge v. New Hampshire**, 503 U.S. 443 (1971); **Whitely v. Warden**, 401 U.S. 560 (1971), or **Chimel v. California**, 395 U.S. 752 (1969), although they were heavily relied upon by Petitioner on appeal. This underscores the danger of the present situation: lower courts may pick and choose among this Court's decisions to support desired results; in doing so they will violate not only this Court's guidelines, but the Fourth Amendment itself.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted

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Dated: August 22, 1972